IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 77-664

Lorn Leroy Hinish

Petitioner,

v.

Hilda R. Hinish(Somers)

Respondent.

PETITION FOR WRIT OF CERTIORARI

Appeal for Writ of Certiorari
on Decisions of Maryland Courts
State of Maryland

For Respondent:
Hugh Burgess, Esq.
Park Ave.
Ellicott City,
Maryland, 21043

Lorn L. Hinish
Pro se
6413 Lochridge Road
Clarksville, Maryland
21044
(301) 531-5915

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F O R W A R D

The herein petition for Writ of Certiorari may well be construed by this Court as a companion case to the Davis v. Davis, No. 77-385, now before the Court, filed August 1977. Petitioner has no objection to having this case heard at the same time if this court deem appropriate, however, it can stand alone on its own merits as to the issues of Constitutional, Human, and Legal attributes.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. .....

Lorn L. Hinish
Petitioner,

v.

Hilda R. Hinish(Somers)
Respondent.

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Petitioner was the defendent/cross-complainant in an action and cause in the Circuit Court for Howard County, State of Maryland, in Equity Number 8253, wherein the Chancellor setting in Equity by Decree dated 18 October and 4 November, 1976, denied quests pursued by Petitioner. The

two orders of the circuit court was timely appealed to the Court of Special Appeals of Maryland; and, there decided adversely to your petitioner and the best interests of his innocent minor child, UNREPORTED, No. 1216, September Term 1976, PER CURIAM, filed August 1, 1977, mandated August 31, 1977. A timely petition for Writ of Certiorari was submitted to the Maryland Court of Appeals and there decided adversely to your petitioner and his minor child by denying Certiorari, No. 255, Court of Appeals, September Term 1977, filed 21 October 1977.

The above captioned orders are included herein as appendix, infra., 1a-22a; Certiorari denied (1a); Court of Special Appeals mandated opinion (2a-11a); Circuit Court Opinion and Decree(s), EQ 8253, (12a-22a).

JURISDICTION

This Court is now dealing with a matter of major public concern and there are special circumstances rendering it desirable and in the public interest that the presented case should be reviewed by this court.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3), this being a matter which draws into question the validity of Maryland case law, Maryland Statute law, Maryland Constitutional Amendment, on ground that Maryland law(s) as applied to petitioner and his child is directed in a manner repugnant to the Constitution of the United States; repugnant to Maryland standing statute law; repugnant to Constitutional law decisions as established by this Court; and, repugnant to Congressional intent of laws of the Nation. These acts deny fundamental rights specially set up by the United States Constitution and

this case is therefore appropriately brought to this court by 'Petition for Writ of Certiorari' pursuant to 28 U.S.C. 1257. The Jurisdiction is sustained by 7B J. Moore, Federal Practice 1257 (2d ed. 1974); C. A. Wright, Law of Federal Courts Sec. 107, pp.491-492 (2d ed. 1970);[1] Reed v. Reed 404 US 71 (1971); Frontiero v. Richardson 411 US 677 (1973); Stanton v. Stanton 421 US 7 (1975); and, Weinberger v. Wiesenfeld 420 US 636 (1975).

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[1] See Hinish v. State of Maryland et. al. 393 F. Supp. 53 (D. MD. 1975)

QUESTIONS

I. Did the Courts of Maryland commit reversable error, abridge law, deny fundamental rights to the innocent little girl child, Lori E. Hinish, by forcing her placement with a criminally neglectful mother and forcing the innocent child to remain in a highly unstable, emotionally disturbed violent and turbulent home environment and deny the child her human right, legal right, to familial relationships with her brothers, her father, and a home of love under the care of her fault-free father of which no evidence of unfitness, emotional instability, exists against him as opposed to the long string of events proven detrimental to the childs

future welfare causing her irrepreable harm, by continued custody in the female divorced parent?

II. Did the Courts of Maryland discriminate invidiously against the divorced male citizen, father, in denial of fundamental rights as guaranteed through familial relationships between father and child by refusing to acknowledge fathers individual qualifications for custody of his sired child and providing dissimilar treatment for men and similarly situated females in a manner repugnant to the Federal Constitutional Fourteenth Amendment, to the Maryland State Constitutional Amendment Article 46, a State created right guaranteeing Equal Rights

and protection assured by Maryland Statute Law, Article 72A-Parent and Child, Maryland Code Annotated and the Congressional intent of the Equal Rights Amendment as accepted and put into law by the State of Maryland?

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CONSTITUTIONAL
AND
STATUTORY PROVISIONS INVOLVED

I. Fourteenth Amendment U.S. Constitution.
II. Seventh Amendment U.S. Constitution.
III. State of Maryland Constitution: Article 46, Declaration of Rights; and, Article XV Sec 6, Trial by Jury.
IV. State of Maryland Annotated Code, Statute, Article 72A -Parent and Child.
V. State of Maryland Court Rule of Procedure, Rule 18, 307, 310, 517.

I

In light of State Court decisions, under color of law, as established by authorities, infra., 2a-22a, in child custody, child placement - a basic Civil Right,[2] petitioner respectfully submits the following fourteenth amendment constitutional law has special application to the case at bar.

[2] See Ives et al. v. Jones et al., Civil No. 75-0071-R, U.S. District Court, Dist. of Va. (F. Supp. .....)

***[A]nd a father, no less than a mother, has a constitutionally protected right to the "companionship, care, custody, and management" of "the children he has sired and raised, (which) undeniably warrants difference and, absent a powerful countervailing interest, protection. Stanley v. Illinois 405 US 645(1972) Weinberger v. Wiesenfeld 420 US 636 (1975). (emphasis supplied.)

***The right asserted here involves the intimate familial relationship between a child and its own father.

***We conclude that it is invidious to discriminate against them when no action, conduct or demeanor of theirs is possibly relevent to the harm that was done the father.
Levy v. Louisiana 391 US 68 (1968). (emphasis supplied)

***No longer is the female destained solely for the home and the rearing of the family, and only the male for

the marketplace and the world of ideas.

***No regard was paid under the statute to the applicants' respective individual qualifications. Stanton v. Stanton 421 US 7 (1975) (deals with decisions laid down in a divorce decree.) (emphasis supplied)

***By providing dissimilar treatment for men and women who are thus similarly situated....violates the Equal Protection clause.

*** All persons similarly circumstanced will be treated alike. Royster Guano v. Virginia 253 US 412 (1920) citing, Reed v. Reed 404 US 71 (1971) (emphasis supplied)

***If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them. Rooker v. Fidelity Trust Co. 263 US 413 (1923)

II

The seventh amendment, U.S. Constitution has applicability only as relates to Maryland Court Rule of Procedure, Rule 517 and Maryland Constitution, see V below.

III

Article 46, Maryland State Constitution, Declaration of Rights, has direct applicability, since it was ignored by Maryland authorities, it is quoted:

> "Equality of Rights under the law shall not be abridged or denied because of sex."[3]

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[3] Art. 46 Maryland Constitution became effective in Maryland on December 5, 1972. The proposed federal constitutional amendment, ratified by 35 of the required 38 states reads in part "Equality of rights under the law shall not be denied or abridged by the U.S. or by any state on account of sex." Maryland chose to reverse "abridged" or "denied."

IV

Article 72A-Parent and Child, Sec. 1, Maryland Annotated Code, has special application to the case at bar. Petitioner was denied attention to this statute as no regard was given to your petitioners respective individual qualifications to care for the child of this litigation.[4] Further, child placement was awarded the female by a constitutionally impermissible decree, which denied petitioner his rights of this law, statute law, denying petitioner "equality of rights under the law" an abridgement of state statute law inconsistant with Art. 46, Equal Rights Amendment (E.R.A.), Maryland Constitutional Amendment. Art. 72A Sec. 1, reads:

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[4] See, Stanton, infra., p.7; See infra., pp. 25-27, Maryland criteria for custody follows presumption female better qualified than males for custody, violation Art.72A/Art.46.

1. Natural guardianship.
The father and mother are the joint natural guardians of their minor child and are jointly and severally charged with its support, care, nurture, welfare and education. They shall have equal powers and duties, and neither parent has any right superior to the right of the other concerning the child's custody. If either the father or mother dies, or abandons his or her family, or is incapable of acting, the guardianship devolves upon the other parent. Where the parents live apart, the court may award the guardianship of the child to either of them but, in any custody proceeding, neither parent shall be given preference solely because of his or her sex.[5] Provided: The provisions of this article shall not be deemed to affect the existing law relative to the appointment of a third person as guardian of the person of the minor where the parents are unsuitable, or the child's interests would be adversely affected by remaining under

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[5] This sentence added and effective July 1, 1974, as an amendment.

the natural guardianship of its parent or parents. (emphasis supplied)

V

Maryland Rule of Court Procedure was denied application consistant with proper procedures accepted and court departed from usual course of judicial proceedings. (R.P. No. 18 - Before or within fifteen days after entry of an appealable final judgment ...the court shall dictate...or prepare and file in the action, a brief statement on the grounds for its decision and the basis of determining the damages, if any; RP No. 307 - The defendent in any action shall file with the clerk his initial pleading within fifteen days...; RP No. 310 - If a party against whom a claim is asserted is in default for failure to comply with the requirements as to time allowed for pleading

....the bill may be taken pro confesso in a proceeding in equity, on motion of the adverse party,....)

In absence of statute or constitutional amendment, petitioner has been denied his constitutional guarantees.

Maryland Constitution Art. XV Sec. 6 reads:

> The right of trial by jury of issues of fact in civil proceeding in the several courts of law in this state, where the amount in controversy exceeds the sum of five dollars, shall be inviolably preserved. (EQ 8253 Hinish v. Hinish commits petitioner to $20,000.00, more or less, without jury trial.)

Maryland Court Procedure Rule No. 517 reads:

> The practice heretofore existing of transferring issues of fact arising in an action in equity to a court of law for an advisory verdict by a jury is hereby abolished. All such issues shall be determined in the equity

court in accordance with existing equity practice, without a jury.

Since no statute or constitutional amendment, by legislative act, exists to negate Art. XV Sec. 6, Maryland Constitution; petitioner submits that Rule of Court Procedure No. 517 is unconstitutional as it is judicial legislation contrary to public interest rendering government by the people impotent. This would require a legal brief of great length, therefore, petitioner will not labor on this issue, but is presented as another area showing Maryland authority continues denial of rights (appears to conflict with Simler v. Conner 372 US 221 9 L. ed. 2d 691 (1963)).

STATEMENT OF FACTS

Movant was the defendent/cross-complainant in an action and cause in the circuit court for Howard County, State of Maryland in Equity Number 8253 wherein the chancellor by decree dated 18 October and 4 November 1976, denied several written motions, infra., pp.21-23, and decided the case adversely to your petitioner, 12a-22a. Appeal was made to the Court of Special Appeals No. 1216, filed January 17, 1977; record was certified and forwarded January 26, 1977. After oral argument of 20 May 1977, a per curiam decree affirming the lower court was filed August 1, 1977, which relied solely on the case authority of Davis v. Davis __MD__, infra., 23a-55 a. Due to the application of this new law made after the case at bar was submitted to the Courts of Appeal on 17 January 1977, Movant was denied law appli-

cable to the trial on merits.

Petitioner and Respondent were once husband and wife, one girl child was born of the eighteen year marriage on 21 August 1967. Petitioner was awarded a divorce on November 17, 1972, on grounds of Respondent committing adultery (although wife deserted home and child, it was not part of the issue). Custody of the child, the true reason of this long and continuous litigation, was awarded to the adulterous parent by court decree, 19 June 1973,[6] in violation of statute Art. 72A and Maryland Constitution Art. 46, even though the chancellor found the father fit for custody and was without fault. This warranted an Appeal, No. 368, September Term 1973, and subsequent filing for change

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[6] Court of Special Appeals No. 1216 distorts facts by saying custody awarded November 1972. Further distorts facts by implying support monies from $30.00 to $45.00; when fact was from $25. to $45. plus benefits.

of custody on grounds respondent married the paramour after advising the chancellor she discontinued her relationship, again decided adversely to your petitioner, and he submits contrary to Maryland law,[7] which warranted Appeal No. 1009, September Term 1974,[8] and subsequent appeal to this court[9] and Sex Discrimination suit in Federal Court, which was dismissed.[10]

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[7] "[a] strong showing of fitness must be made by adulterous parent. The fact that she subsequently marries the paramour has not been regarded as meeting the requirements of such a showing. Hild v. Hild 221 MD 349.

[8] Courts of Appeal distorts facts by citing Number 290 Appeal; No. 290 had nothing to do with this case or any part of EQ 8253, custody issues.

[9] Hinish v. Hinish Supreme Ct No. 75-347, Cert denied Nov. 3, 1975.

[10] See Footnote No. 1, infra.

On or about 13 July 1976, Respondent filed for increase of support monies and petitioner cross-filed for custody on the grounds that the environment of the child was highly turbulent; not in the best interests of Lori [the child]; was in a continuous state of turmoil even to the point that on a minimum of four (4) separate occassions warranted local police intervention; the childs medical needs were not being met by the mother, custodian, as ordered by the court and two medical doctors. Additional allegations were also made, too numerous to include herein.

Some eleven (11) written motions were submitted to the Maryland Circuit Court covering a wide range of "Equitable" relief applicable to the case, such as:

1. This court issue orders to respondent to answer "X-File petition for modification of custody decree and change of custody" and be prepared to show cause on 25 October 1976 why, if any she may have, custody should not be changed and custody of Lori E. Hinish be awarded to her father. (Decree- 18 October 1976 ordered respondent to comply by 21 Oct. 1976; Respondent failed to do.)
2. The court issue orders to respondent to answer "Interrogatories" as submitted by complainant. (18 Oct. 76 Decree ordered to comply by 21 Oct. 76.)
3. The court of Howard county, state of Maryland, relinquish any and all jurisdiction holding it may now posses over the cause and action and transfer to another jurisdictional outside the purview of the fifth circuit court. Affidavit was attached. (Decree 18 Oct. 76 denied)
4. The court send the issues of this cause and action to a jury for findings of facts. (Decree 18 Oct. 76 denied)

5. The court find and rule that the child custody decree of June 19, 1973 is constitutionally impermissible; abridge law of Maryland. (Decree 4 Nov. 76 declared issue moot - denied.)
6. The court modify temporary custody awarded to the father by the Howard County Court decree of 19 June 1973, if the father fails in convincing the court that he should have, custody of the child he has sired, namely Lori E. Hinish. (Requested for summer vacation Christmas and 50% of all legal holidays; Decree 4 Nov 76 gave Birthday and Christmas but provides no vacation time and gives no reason for denying.)
7. This court deny any increase in support monies payable to Hilda R. Somers, respondent, under the Court decree of 19 June 1973. (Decree 4 Nov 76 increased support 100%; no proof of childs needs increased, contrary to Art.46/72A.)
8. This court find Hilda R. Somers, respondent, in contempt of this courts orders. (Decree 4 Nov 76, contrary to her refusing medical attention for 2-years the court refused to find contempt, as a favor to the ladies.)

9. The court grant and issue injunctive relief in favor of Lorn L. Hinish enjoining respondent, Hilda R. Somers, from now or in the future communications with complainants employer on issues before the court.
(Decree 18 Oct. 76 enjoined respondent)
10. This court assign a male to responsibilities of court report on trial of merit or in the alternative assure the reporter, if female, certain language may be used at trial that may be offensive to her social teachings. (Decree 18 Oct. 76 denied.)
11. The court provide findings and ruling on constitutional issues presented and state any and all requirements it requires to assure a clean case for complainant to return to the federal forum on constitutional issues, in event complainant feels constitutional areas were ignored or not answered by the court. (Decree 4 Nov. 76 commented on it but did not deny or act merely left hang but refused to give justification on subsequent denial.)

The Chancellor again decided the case adversely to petitioner and the best interests of the child which warranted Appeal No. 1216, September Term 1977, which affirmed the lower courts decree by refusing to act on grounds:

> "we have no authority to disturb the Chancellor's decision. The admonition of the Court of Appeals in Davis is peculiarly appropriate to the case, sub judice...."

Subsequent Appeal was taken to the Court of Appeals, No. 255 September Term 1977, Certiorari denied 21 October 1977.

The case law applied to petitioners cause and action, detrimental to the child of the litigation and violation of fundamental rights, is presented as follows:

***[p]articularly if the child is a girl, custody is ordinarily awarded to the mother, at least temporarily, even if the father is without fault.

***The fact remains, however, that in most instances, on a day by day basis, a small girl must rely on her mothers attentions and companionship, however devoted her father may be.
Hinish v. Hinish EQ 8253 Dtd 10 June 1973, Howard County Circuit Court. (emphasis supplied)

***Since the mother is the natural guardian of the young and immature, custody is ordinarily awarded to her ...even when the father is without fault.
***[t]he mother is still regarded as the favored custodian for children of young and tender years.
Hinish v. Hinish, UNREPORTED, Ct. of Sp. App. Md. No 368, Sept. Term 1973, filed January 14, 1974(appears to be clearly in violation of Art. 72A Md Code and Art. 46 Md. Const.)

***[t]his court concludes that the award of custody of Lori to her mother should not be disturbed.

***[t]his court is concerned about the emotional health of Lori...while it will continue custody of Lori in her mother, it will require that Mrs. Somers (mother) arrange for psychriatic treatment for both Lori and herself. Hinish v. Hinish EQ 8253, Dtd. 3 Dec. 1974, Circuit Court.

(Court concerned about childs welfare yet keeps her in the poor environment rather than give custody to fit father)

***Mr. Hinish's multiple allegations of violations by the Chancellor of the Judicial canon of ethics are not within our realm. [note: several constitutional questions and issues were presented, Art. 46/Art. 72A, case law, and Constitutional law decisions of this high court. The Courts of Appeal, Md., refuse to recognize Supreme Court decisions and refuse to direct their attention

to provide decisions on issues, which in fact is construed as a decision even though no comment is made.) Hinish v. Hinish, UNREPORTED, Ct. of Sp. App. No. 1009, Sept. Term 1974 June 17, 1975. See also Hinish v. Hinish, Supreme Court No. 75-347 Cert. denied Nov. 1975.

Turning to the most recent case law, which also appears to be constitutionally void, infra., 2a-22a, (increased support monies by 100%, contrary to Md. own statute law, and case law; denies the child a summer vacation with father; failed to adhere to England as requested therefore allows this case to be reviewed by federal forum; failed to rule on jurisdiction, as the case was before federal courts and refused to relinquish their authority and went ahead with the case even though advised that several issues of the case was ongoing in Federal Court; refused to assure child receives

medical attention; requires the male divorced citizen to "show continued fitness" even when not challanged, however, the court does not require the female to show any degree of fitness, nor require showing that the turmoil will be discontinued that affect the child, even when challanged, this establishes a distinction solely upon basis of sex, in clear violation of law.)

On 14 October 1976, the Chancellor ordered the "child abuse division of Howard County" to investigate the turmoil in the home of Lori, the minor child of this litigation. To that end, NO REPORT was ever submitted to the court, even after ordered by the court, as required by state law, and thereby denying petitioner a fair hearing.[11]

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[11] Maryland law has long held in determining where best interest of child lie, [chancellor] should require investigative reports and cause the production of such testimony (cont.)

During the hearing, petitioner moved for Pro Confesso judgment (Maryland Rule 307 and 310, infra., pp. 14-15) because respondent failed to answer complaint; did not contest complaint; refused to appear for the hearing; refused to comply with court order; and, the petitioner showed good cause why custody should be changed[12] and the law has been factually denied to your petitioner.

During the hearing, dual standards were applied, one for petitioner and one for

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[11] cont./ and other evidence as may be neccessary for a fair hearing. Jester v. Jester 246 MD 162; Ouellette v. Ouellette 246 MD 604;(As to custody of the child there is nothing in the record which would contradict or deny appellants fitness as custodian of the child-custody must be awarded to him) See also Davis v. Davis ___MD__[Supreme Court No. 77-385 filed August 1977].

[12] Mother failed to give child needed medical attention[ordered by court], married paramour, etc. etc.

respondent;[13] and ignored witness testimony which favored the father, even when the court declared that witness "credible." The court, against credible witness testimony, then says petitioner was "absent a showing that the complainant continues to be a fit person for custody, her custody will not be changed;" infra., 20a. The fathers fitness was never challanged nor does any evidence exist against the father; denying petitioner even-handed application of law.[14]

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[13] See, infra., pp.9-10 (Constitutional law)

[14] Maryland Courts of Appeal have factually ignored the sound principles announced by this court in Reed, Frontiero, Stanton, Weinberg, Levy, Rooker, England. See also requirements of State law Art. 72A/Art. 46, infra., pp. 11-14.

HOW FEDERAL QUESTIONS WERE RAISED AND ANSWERED

Constitutional and statutory issues were raised by way of Bill of Complaint, during the trial on merits, legal brief to Court of Special Appeals and petition for writ of certiorari to the Court of Appeals. The Chancellor acknowledged the bill of complaint and on merits recognized: 1) a legal question on support payments to a mother when she is not providing required support, 2) the decree of June 19, 1973, [which awarded custody to mother] perhaps was predicated on fraud existing when originally issued, 3) that respondent failed to answer complainants [father] petition for custody, 4) that respondent failed to adhere to court order requiring her to answer cross-complaint of the father, 5) he would take judicial note of police reports

as submitted in evidence, medical reports of the surrogate father, and depositions on record, 6) the chancellor allowed father on direct examination to answer, over objection, the question put to him "do you believe your constitutional rights have been violated?"

The court further discussed constitutional rights with the father at the closing of the hearing by asking views of how his right has been affected by the court; the father cited the Weinberger case, among others, and included Maryland Case law that was ignored.

The decrees, infra., 2a-22a is self-explanatory on how the issues were resolved by the courts. They merely chose not to address any of the constitutional and statutory issues in their orders; contrary to guidance laid down by decisions of this court, requiring this courts remedial process.

ARGUMENT

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Petitioner, having exausted all his State remedies to have his constitutional questions answered as presented in Bill of Complaint, brought out at the trial on merits, presented in legal brief's to the Court of Special Appeals, presented to the Court of Appeals, on petition for certiorari and his failure to have his cause and action decided by even-handed application of law, respectfully submits there are special circumstances rendering it desirable and in the public interest that the case at bar be reviewed by this court. Such circumstances and the reason(s) why review is desirable are set forth clearly herein and hereinafter.

A court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter - child

custody;[15] has decided an important state question in a way conflicting with applicable decisions of this court;[16] has departed from accepted and usual course of judicial proceedings by sanctioning a lower court decision contrary to good underpinnings[17] to such a degree as to call for an exercise of this courts power of supervision, and full review of the Chancellors, and Courts of Appeal, decision(s).[1]

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[15] Cited 350 N.Y.S. 2d 285 (presumption that mother is better suited to have custody of child of tender years works unconstitutional discrimination against fathers. Domestic relations law. 14th U.S.C.A.)

[16] See infra., pp. 9-10 , 25-27

[17] Leary v. United States 89A US 1532 (1969)

A court of appeals, after reviewing the record, has factually abridged and or denied an innocent little girl, Lori E. Hinish, the factual reason of this long litigation, her fundamental rights by forcing her placement with a criminally neglectful mother, gives this court jurisdiction without further elaboration. By such forced placement in a home with continuous hostility, highly unstable environment, emotionally disturbed and turbulant atmosphere, denies Lori her civil rights[18] human rights, legal rights, to receive protection by a Court of Appeal through their absolute failure to exercise their authority to overrule a lower courts decision when they acknowledged that there is no evidence of the

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[18] See Footnote No. 2

[19] Hinish v. Hinish EQ 8253; Ct. Sp. App. No. 368 and No. 1009, cited in Supreme Court No. 75-347, Cert. denied 3 Nov. 1975.

father being emotionally unstable, unfit or unworthy of her custody being awarded unto him.[19] Such decision goes against the fundamentals of our system of law and strikes at the very balance we seek to maintain.

Continued child custody in the mother does not mean that a childs mere time possession by the mother give her everlasting dominion over the child by some form of tenure or prescriptive right. The court of appeals, Maryland, affirming a lower courts ruling adhering to this belief, the case at bar, constitutes a denial of the privilege and right of an innocent little girl to have her placement by state authority in a home with love, without continuous hostility and turmoil detrimental to her growth, denies Lori her natural guaranteed fundamental rights, denies Lori her right of association

with her three brothers, gambling with her future; all because of pervasive judicial biases, discrimination through pattern, sex, custom and practice, not sound deliberation.

In the delicate process of child placement determination, a basic civil right[2], to the child and to the parents, a human right, a legal right, courts must use all available evidence made known to them. To do less, as in the case at bar, is a very serious matter detrimental to the public interest. When the State Courts fail to act in the public interest, as in this case, it denies a litigant a fair hearing. When courts distorts the merits of trial and appeal to further discriminatory practices based on SEX, pattern, custom and practice, then it renders government inpotent.

The Maryland Circuit Court and the Courts of Appeal had before them several issues of

major public concern, each unto themselves, individually and collectively, have factually denied your Movant, and the innocent little girl Lori, their constitutionally guaranteed right to have their cause and action decided by them in a manner guaranteed by law; including constitutional questions posed in the bill of complaint, posed in legal brief to the Court of Special Appeals, posed at the trial on merits. The ruling laid down by Maryland Courts denies and abridges law of Maryland, decisions of this court. Therefore it appears obvious this court must exercise its authority and review the case in full and in totality to assure the public interests are served and our system of law is preserved to the highest degree of 'equitable justice.'

CONCLUSION

Far too often State Court Judges divorce children from their fathers. Since the State of Maryland authoritative representatives of state business fail to recognize the authority of this courts decisions on matters of public concern, forcing an innocent little child to remain in a very highly unstable environment with a mother who refuses medical care to the child and forcing a father to live in "sheer hell" worrying when will his child be raped or harmed by the emotionally disturbed surrogate father, (who was for 3-years declared mentally incompetent-brain damage), this court must exercise its supervision power in the public interest.

Therefore, your Petitioner/Movant, most respectfully, having exausted all state remedies, moves this Honorable Court for a Writ of Certiorari to the United States Supreme Court. This court should cause

and issue said writ to the court of appeals State of Maryland, Annapolis, Maryland, and order the record, now held by the 5th Circuit Court of Howard County, Ellicott City, Maryland 21043 be forwarded for this courts full review; with certification that the United States Supreme Court is willing that the record and proceedings be forward is requested. The grounds of this motion have been clearly set forth herein and are <u>founded on sound professional decisions</u>. This court should give plenary consideration with briefs and argument on merits. In event a writ of certiorari is not the appropriate vehicle for Movants cause and action, then he moves that Appeal be entered pursuant to 28 U.S.C. 1257, as it effects rights guaranteed to innocent children to have the protection of this court in their pursuit of happiness and secured development in an

insecure world. This court now has the opportunity to cause and establish "Equal Rights" guidelines for federal and state courts on a very serious matter - child custodial guardianship by divorced male citizens, fathers. This area of social development is nearing cancerous proportion (over one million divorces in 1976, over 2-million children affected each year). "Fathers" are fast becoming an <u>endangered</u> species and requires the attention of this court. Due to pervasive biases, discrimination by sex, prejudices against divorced male citizens having custody of their children of a broken marriage is currently through Equity Courts giving the stench of sex prejudices with such effluvium that it must nauseate lady justice and is reaching into the Halls of Congress affecting the divorce male custodial fringe benefits as

assured and guaranteed by the Constitution of the United States.

Your Movant being fully cognizant of this courts views against Pro se representation, on issuance of writ of certiorari, Movant assures and so stipulates he will designate to this court an attorney at law authorized to appear before this court to prepare Briefs and present oral arguments, on behalf of your Movant.

Probable jurisdiction should be noted, and this case should be given plenary consideration, with briefs on the merits and oral argument for resolution of questions.

Respectfully submitted,

Lorn L. Hinish

Lorn L. Hinish, pro se
6413 Lochridge Road
Clarksville, Maryland
21043
(301) 531-5915

APPENDIX A

Order - Court of Appeals No. 255, Sept. Term 1977 (No. 1216, Sept. Term, 1976 Court of Special Appeals)..... 1a

Court of Special Appeals Decision No. 1216 September Term 1976..... 2a-11a

Circuit Court For Howard County EQ 8253; Dated 18 October 1976..... 12a

Dated 4 November 1976..... 13a-22a

Davis v. Davis No. 150 Sept. Term. 1976. 23a-55a

LORN L. HINISH

v.

HILDA R. HINISH

In the
Court of Appeals
of Maryland

Petition Docket No. 255
September Term, 1977
(No. 1216, September Term
1976 Court of Special
Appeals

O R D E R

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: October 21, 1977.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

September Term, 1976

No. 1216

LORN L. HINISH

V.

HILDA R. HINISH

Morton

Menchine

Melvin,

JJ.

PER CURIAM

Filed: August 1, 1977

This is a pro se appeal by Lorn L. Hinish (father) from a decree signed by Judge James L. Wray sitting in the Circuit Court for Howard County in which he ordered, inter alia, that Hilda R. Hinish (now Somers) (mother) continue having custody of the parties' minor child, Lori Hinish.

The record indicates that the parties were divorced on November 17, 1972, at which time custody of their infant daughter was awarded to the mother. Since that time the parties have pursued a continual course of litigation, including an appeal by the father to this Court (Hinish v. Hinish, No. 290, September Term, 1975, per curiam opinion filed November 14, 1975). The father again appeals to this Court and presents some sixteen contentions why the chancellor's decree dated November 14, 1976, should be set aside.

The decree was issued after the mother had filed a petition to increase child support from $30 per week to $50 per week and praying that the father be required to pay $600 in child support arrearages. The father countered with a petition that he be awarded permanent custody of the child. The decree (1) continued custody of the child in the mother, (2) increased the father's visitation rights, (3) required him to pay $450 in child support arrearages and (4) increased the child support payments to $45 per week.

While the father has advanced a number of issues in this appeal, his main thrust and ultimate objective is to pursuade us that the chancellor was in error in continuing custody of the parties' child in the mother. In considering this contention we are, of course, bound to adhere to

the quidelines recently announced by the Court of Appeals in Davis v. Davis, ___Md. ___(No. 150, September Term, 1976, filed April 12, 1977). The Court first discussed the "Standard of Appellate Review in Child Custody Cases" and concluded that Maryland Rule 886 and its identical counterpart Maryland Rule 1086, which governs this Court,

> "***is controlling in child custody cases, [and] we now consider the extent to which the 'clearly erroneous' portion of it applies in such appeals. The words of the rule itself make plain that an appellate court cannot set aside factual findings unless they are clearly erroneous, and this is so even when the chancellor has not seen or heard the witnesses. On the other hand, it is equally obvious that the 'clearly erroneous' portion of Rule 886 does not apply to a trial court's determinations of legal questions or

conclusions of law based upon findings of fact.

Although these two propositions are clear, there is some confusion in our cases with respect to the standard of review applicable to the chancellor's ultimate conclusion as to which party should be awarded custody. Notwithstanding some language in our opinions that this conclusion cannot be set aside unless clearly erroneous, we believe that, because such a conclusion technically is not a matter of fact, the clearly erroneous standard has no applicability. However, we also repudiate the suggestion contained in some of our predecessors' opinions that appellate courts must exercise their 'own sound judgment' in determining whether the conclusion of the chancellor was the best one. Quite to the contrary, it is within the sound discretion of the chancellor to award custody according to the exigencies of each case, and as our decisions indicate, a reviewing

court may interfere with such a determination only on a clear showing of abuse of that discretion. Such broad discretion is vested in the chancellor because only he sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; he is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor.

> ***Finally, when the appellate court views the ultimate conclusion of the chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the chancellor's decision should be disturbed only if there has been a clear abuse of discretion."
> (Citations omitted.)

From a careful review of the record before us,[1] we cannot find that the chancellor's factual findings were clearly

erroneous. At the hearing below he had an opportunity to see and hear the witnesses, to observe their conduct and demeanor and to assess their credibility. Moreover, the chancellor in his "Memorandum of Opinion and Decree" alluded to the fact that "[i]n a private interview with Lori in chambers, the Court concluded that Lori is above-average in intelligence; has already learned to manipulate her parents; but is probably the most stable of any of the principals."

The chancellor specifically found that it was in the interest of "Lori's welfare" that her custody be continued in the mother. Having found that his factual findings were not clearly erroneous (Maryland Rule 1086) and having further found that there was no "clear abuse of discretion," we

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[1]None of the testimony adduced at the hearing below was printed in appellant's

have no authority to disturb the chancellor's decision. The admonition of the Court of Appeals in Davis is peculiarly appropriate to the case sub judice:

> "A case such as this, where custody might well have been awarded to either parent, aptly demonstrates the advisability of leaving to the chancellor the delicate weighing process necessary in child custody cases; to disturb the award here would require that we substitute our judgment for that of the chancellor, and an appellate court sits in a much less advantageous position to assure that the child's welfare is best promoted."

For the reasons set forth in the chancellor's "Memorandum of Opinion and

---

(1 cont.) "Appendix" as required by Maryland Rule 1028. We have nevertheless carefully reviewed the transcript of that testimony which was a part of the record.

Decree" we agree that the father was not entitled to a change of venue or to a jury trial; that the constitutionality of the June 19, 1973, decree is moot; that the chancellor properly declined to "lay out almost a day-to-day visitation schedule" and to rule whether the father or mother could claim Lori as a dependent for income tax purposes; and properly refused to terminate support payments when Lori was visiting the father. Moreover, the chancellor did not abuse his discretion in refusing to hold the mother in contempt for failure to provide psychiatric treatment for herself and Lori and, finally, properly denied the father's eleventh motion to the effect that "[t]he Court provide findings and rulings on constitutional issues presented and state any and all requirements it requires to assure a

clean case for Complainant to return to the federal forum on constitutional issues in event Complainant feels constitutional areas were ignored or not answered by the Court."

DECREE AFFIRMED;
COSTS TO BE PAID BY
APPELLANT.

LORN L. HINISH	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
HILDA R. HINISH	*	HOWARD COUNTY
Defendant	*	EQUITY NO. 8253

D E C R E E

The Complainant's Motions 1, 2, 3, 4, 9, and 10 having come on for hearing, it is this 18th day of October 1976, by the Circuit Court for Howard County,

ADJUDGED, ORDERED, and DECREED: That the Respondent file an answer to the Cross-Petition for Modification of Custody Decree and Change of Custody by 21 October 1976;

That the Respondent file Answers to the Complainant's Interrogatories by 21 October 1976;

That Motion No. 3 is denied;

That Motion No. 4 (if a prayer for jury trial of all issues) is denied; (or if a prayer for a jury trial of any contempt issue) or is denied as premature;

That Hilda R. Somers be, and she is hereby, enjoined from communicating with the Complainant's employer;

That Motion No. 10 is denied.

//s//
James L. Wray,JUDGE

LORN L. HINISH	*	IN THE
Complainant	*	CIRCUIT COURT
v.	*	FOR
HILDA R. (HINISH) SOMERS	*	HOWARD COUNTY
Respondent	*	EQUITY NO. 8253

MEMORANDUM OF OPINION AND DECREE

In his third motion, the Complainant asked that the Circuit Court for Howard County relinquish jurisdiction and trasfer the proceeding to another court for hearing. The motion was denied. The Complainant asks now for the reasons, Rule 18.

The Complainant alleges that Judge James Macgill practices sex discrimination in the granting of custody, and that the case should be decided by a judge "not under the watchful eye of the Chief Judge of the fifth Circuit." His implication is that Judge Macgill would apply pressure to the writer to decide the case a certain way; that was not expected to occur and

did not occur. The Complainant's reliance on House Bill 933 (now Chap. 454 of 1976 Laws of Maryland) is misplaced. The act applies only to actions at law.

The Complainant's fourth motion asked the court to refer all issues to a jury for determination. He argues that Rule 517 is unconstitutional, citing Simler v. Conner, 372 US 221, 9 L.ed. 2d 691 (1963). He misunderstands the holding in Simler. In a diversity case brough in the federal court in Oklahoma, the plaintiff prayed a jury trial. If the suit had been brought in the state court, it would have been on the equity side. The Supreme Court ruled that entitlement to a jury trial in a federal court was governed by federal law, and not state law, an that federal law offorded the plaintiff a jury trial.

The Complainant's fifth motion asks that the Decree of 19 June 1973 be held unconsti-

tutional. The Motion is moot. The issue should have been raised in the first appeal.

The Complainant, in his sixth motion, asks the court to lay out almost a day by day visitation schedule; the Court declines, but will add Lori's birthday and Christmas Eve and Christmas Day to the present schedule. He also asks a ruling as to whom may claim Lori as a deduction on his income tax return. This is a matter between the parties and the Internal Revenue Service. He also asks that support payments be terminated when he has Lori with him. This would put the Court in a position of keeping books for the parties; this the Court declines. And besides, it also calls for such fine calculations as to be impractical.

The Complainant's seventh motion will be ruled on when the Respondent's Petition for an increase in child support is ruled on.

The Complainant's eighth motion asks that the Respondent be held in contempt for failure to follow the Court's decree of 4 December 1974, which ordered the Respondent to provide psychiatric treatment for herself and for Lori. (The Decree also ordered the Complainant to "arrange for, and submit to psychiatric treatment", as a condition to his continued visitation.) The evidence at the hearing was that the Respondent took Lori to a Mrs. Turner, presumed to be a psychiatrist, at the Howard County Health Department about six or seven weeks ago. No other evidence was adduced, nor was any showing made that Lori needs psychiatric attention at this time. In a private interview with Lori in chambers, the Court concluded that Lori is above-average in intelligence; has already learned to manipulate her parents; but is probably the most stable of any of the principals. The Court does not find that the Respondent is in contempt, but out of concern for Lori asks that the parties give to Mrs. Tuner the appropriate release so that she may give the Court a short report either written or verbal.

The complainant's eleventh motion is:

> "The Court provide findings and rulings on constitutional issues presented and state any and all requirements it requires to assure a clean case for Complainant to return to the federal forum on constitutional issues, in event Complainant feels constitutional areas were ignored or not answered by the Court."

The Court does not know what the Complainant desires of it. It has no crystal ball or powers of divination that enable it to prophesy what the federal forum may do.

Nor does it feel any compulsion to act as the Complainant's attorney so that he is assured a "clean case" whatever that is.

The Complainant, in response to the Respondent's Petition to Increase Child Support, filed a Petition for Modification of Custody Decree and Change of Custody and a Petition for Temporary Custody and Permanent Custody Pente Lite (sic).[1]

[1] The Complainant moved for a Decree in his favor because of th ewant of an answer to his petition for Modification of Decree and Change of Custody. The Respondent answered the second Petition, which would seem to be sufficient. If it is not, child custody is still too important a matter to go by default.

The Complainant adduced evidence that there is some lack of tranquillity from time to time between the Respondent and her present husband, resulting a few times in police calls. He also alleged that undesirable language is used in Lori's presence, but failed to produce any evidence of it. He put on no evidence of his own continued desirability as a custodian beyond his assertions that he wanted to plan for Lori, provide for her college education, furnish her a good home, see that she got medical attention and love, and afford her the opportunity to grow up with "her" family; which he defines as himself, his present wife (Lori's step-mother), two sons aged 2 1/2 years and one year (Lori's half-brothers), and another child expected in March or April of 1977. The Court found Mr. Murray Stein's testimony credible; but there was no evidence that

any of the bichering or unpleasantness in the Somers' home, except for one time, was available even to Lori's unconscious mind. Absent a strong reason affecting Lori's welfare, and a showing that the Complainant continues to be a fit person for custody, her custody will not be changed; Krebs v. Krebs, 255 Md. 264 (1969). One might also observe that Lori is now getting the attention of an only child, while she would soon be competing with three others if custody were changed.

After consideration of all of the Complainant's cancelled checks and the testimony in the case, it has been determined that the Complainant is in arrears in child support $450.00 through the end of October.

The Respondent testified that because Lori is older and because of the inflation to which we have all been subjected in the

last three years, Lori's needs have increased to $51.00 a week, exclusive of medical attention. A more reasonable figure would seem to be $45.00 per week, in view of the Complainant's increased income and of his asserted intention to make medical services available to Lori.

Whereupon, it is this 4th day of November 1976, by the Circuit Court for Howard County,

ADJUDGED, ORDERED, and DECREED: That custody of Lori Hinish is continued in the Respondent;

That the Complainant may have visitation from 4:00 to 8:00 p.m. on Lori's birthday;

That the Complainant may have visitation from 4:00 p.m. Christmas Eve to 4:00 p.m. on Christmas Day;

That the Complainant pay the arrearage of $450.00 to the Respondent forthwith;

That, beginning with the first week of November, the Complainant pay child support

in the amount of $45.00 per week through the Howard County Parole and Probation Department, plus any administration charge that that Department imposes;

That the Complainant's fifth, sixth, seventh, eighth, and eleventh motions be, and they are hereby, denied;

That the Cross-Petition for Modification and Petition for Temporary Custody and Permanent Custody be, and they are hereby, dismissed;

That the Complainant pay the costs herein.

/s/
James L. Wray, JUDGE

cc: Mr. Lorn Hinish
Hugh Burgess, Esquire
Howard County Department of
Parole and Probation

IN THE COURT OF APPEALS OF MARYLAND

No. 150

September Term, 1976

MARY LOUISE DAVIS

v.

JOHN FRANKLIN DAVIS, JR.

Murphy, C.J.
Singley
Smith
Digges
Levine
Eldridge
Orth,
JJ

Opinion by Digges, J.

Filed: April 12, 1977

In this child custody dispute between divorced parents, we refuse to be cast in the role of a "super-super Solomon." The chancellor, properly assuming the duty of Solomon (as is his responsibility), awarded custody of the couple's youngest child, Leigh, to the mother, however, the Court of Special Appeals acted as a "super Solomon" by substituting its judgment for that of the trial court, and placed the girl with her father.[1] We now reverse that

1. We are referring, of course, to the story of King Solomon in the Bible. 1 Kings 3:16. The reluctance of appellate courts to play "super Solomon" was referred to in a recent decision of Pennsylvania's intermediate appellate court which (ironically we think) was reversed by that state's Supreme Court. Commonwealth ex rel. Myers v Myers, 237 Pa.Super.Ct. 192, 352 A.2d 458, 459 (1975), rev.d, Pa. , 360 A.2d 587 (1976).

judgment and direct reinstatement of the chancellor's order.

The case before us is not an atypical example of the custody fights that often accompany divorces. Petitioner Mary Louise Davis and respondent John Franklin Davis, Jr. were married in 1958; three children, and nearly fifteen and one-half years later, the parties separated. To be explicit, Mrs. Davis, together with her six-year-old daughter Leigh, left the homestead on January 31, 1974, and moved into an apartment. That September, Mr. Davis filed a bill of complaint seeking a divorce a vinculo matrimonii on the ground of his wife's adultery; additionally, he requested both temporary and permanent custody of the children. Mrs. Davis subsequently

filed a cross bill for divorce a mensa et thoro, for custody of the children, and for alimony and child support. Following proceedings before a domestic relations master, the Circuit Court for Montgomery County (Cahoon, J.) in March 1975 ordered pendente lite that custody of John and Mary (the two oldest children) be awarded to Mr. Davis, that custody of Leigh be awarded to Mrs. Davis, and that Mr. Davis pay $175 per month for the maintenance and support of the youngest child. The matter was heard before Judge Richard B. Latham on May 21 and 22, and by order of July 8, 1975, the court granted Mr. Davis a divorce a vinculo matrimonii; however, the chancellor reserved ruling on the permanent custody of the children. After the submission of a court investigator's report and recommendations, and following an additional hearing on December 11, 1975, Judge Latham ordered that Mrs. Davis be awarded custody of Leigh, that Mr. Davis be awarded custody of John and Mary, and that Mr. Davis pay monthly $175 to Mrs. Davis for the support and maintenance of Leigh.

Mr. Davis noted an appeal to the Court of Special Appeals; that court reversed the order of the chancellor and awarded custody of Leigh to her father.[2] Davis v. Davis, 33,MD.App. 295,364 A.2d 130 (1976). The court reasoned that it was "not bound by the clearly erroneous

2. Mrs. Davis did not cross-appeal the custody award of John and Mary to Mr. Davis and, therefore, the only question before the Court of Special Appeals was the custody of Leigh.

rule, Md. Rule 1086, but must exercise its own good judgment as to whether the conclusion of the chancellor is the best one," id. at 301 (133), that Mrs. Davis was required, but had failed, to show "that she had repented and there was little likelihood of a recurrence of (her adulterous) actions," id. at 302-03 (134), and therefore "that the chancellor was erroneous in his determination that the best interest of the child required that custody be continued in the mother." Id. at 303 (134). We granted certiorari. Because we disagree with both premises, as well as the conclusion, of the Court of Special Appeals, we shall reverse its judgment and reinstate the order of the chancellor.

(1) Standard of Appellate Review in Child Custody Cases

Because we recognize that there are prior decisions of this Court which support the Court of Special Appeals' statement in its opinion in this case that "an appellate court... must exercise its own good judgment as to whether the conclusion of the chancellor is the best one, "33 Md.App. at 301, 364 A.2d at 133, and inasmuch as, in line with our more recent cases, we now categorically reject this view, we feel constrained to clarify the standards of appellate review in child custody cases.

Maryland Rule 886 (applicable to this Court) and, in identical language, Rule 1086 (applicable to the Court of Special Appeals) provide the standard of review of actions tried

without a jury.[3] In such actions, the appellate courts of this State "review the case upon both the law and the evidence, but the judgment of the lower court will not be set aside on the evidence unless clearly erroneous and due regard will be given to the opportunity of the lower court to judge the credibility of the witnesses." Rules 886 & 1086. The "clearly erroneous" concept is no newcomer to Maryland procedure: The predecessor of Rule 886 (adopted effective January 1, 1957 as Rule 886 a), General Rules of Practice and Procedure, Part Three III, Rule 9 c

3. Since Rules 886 and 1086 are identical, what we say with respect to one is equally applicable to the other.

(effective September 1, 1944), contained the same scope of review embodied in the present rule; moreover, prior to the standard's codification as a rule, it was the time-honored practice on appeals to this Court in equity actions to give great weight to the chancellor's findings of fact. See, e.g., Garner v Garner, 171 Md. 603, 614-15, 190 A. 243, 249 (1937); Sporrer v. Ady, 150 Md. 60, 70, 132 A. 376, 380 (1926). And we have heretofore noted that these rules in essence merely conformed the scope of review in nonjury actions at law to the scope of review we had always applied in equity appeals. See Greenberg v. Dunn, 245 Md. 651, 655, 227 A.2d 242, 244 (1967); Wallace v Fowler, 183 Md. 97, 99, 36 A.2d 691, 692 (1944). Nothing in Rule 886 indicates that it

does not apply to all cases tried without a jury, and we have explicitly held that the rule applies when we review nonjury criminal causes (under Rule 772), State v Devers and Webster, 260 Md. 360, 381, 272 A.2d 794, 805, cert. denied, 404, U.S. 824 (1971); Greene v State, 229 Md. 432, 433, 184 A.2d 621, 622 (1962) (per curiam), nonjury defective delinquency cases, Johns v Director, 239 Md. 411, 412, 211 A.2d 751, 752 (1965), child support awards, Wooddy v. Wooddy, 258 Md. 224, 228, 265 A.2d 467, 470 (1970), and child custody cases. Hild v Hild, 221 Md. 349, 359, 157 A.2d 442, 448 (1960). Since Hild we have consistently applied the "clearly erroneous" portion of Rule 886 (or that standard without citation to the rule) in our review of child custody

awards. See, e.g., Hall V. Triche, 258 Md. 385, 386, 266 A.2d 10 (1970) (per curiam); Spencer v. Spencer, 258 Md. 281, 284, 265 A.2d 755, 756 (1970) (per curiam); Goldschmiedt v. Goldschmiedt, 258 Md. 22, 26, 265 A.2d 264, 266, (1970); Franklin v. Franklin, 257 Md. 678, 684, 264 A.2d 829, 832 (1970); Kauten v Kauten, 257 Md. 10, 12, 261 A.2d 759, 761 (1970); Hardisty v. Salerno, 255 Md. 436, 438, 258 A.2d 209, 210 (1969) (per curiam); Holcomb v. Holcomb, 255 Md. 86, 87-88, 256 A.2d 886, 887 (1969) (per curiam); Orndoff v. Orndoff, 252 Md. 519, 522, 250 A.2d 627, 628 (1969); Cornwell v Cornwell, 244, Md. 674, 678, 224 A.2d 870, 872-73 (1966); Andrews v Andrews, 242 Md. 143, 154, 218 A.2d 194, 201 (1966); Daubert v Daubert, 239, Md. 303, 309, 211 A.2d

323,327 (1965); Winter v. Crowley, 231 Md. 323, 329, 190 A.2d 87, 90 (1963); Parver v. Parker, 222 Md. 69, 75-76, 158 A.2d 607, 610 (1960). Moreover, even prior to our explicit recognition in Hild of the applicability of Rule 886, our predecessors in essence utilized the clearly erroneous standard when reviewing factual determinations on appeals of child custody actions. See, e.g., Sewell v. Sewell, 218 Md. 63, 71, 145 A.2d 422, 426 (1958); Wilhelm v. Wilhelm, 214 Md. 80, 84, 133, A.2d 423, 425 (1957); Trudeau v. Trudeau, 204 Md. 214, 218, 103 A.2d 563, 564 (1954); Cullotta v. Cullotta, 193 Md. 374, 384, 66 A.2d 919, 924 (1949); Sibley v. Sibley, 187 Md. 358, 362, 50 A.2d 128, 130 (1946).

Having determined that Rule 886 is controlling in child custody cases, we now consider the extent to which the "clearly erroneous" portion of it applies in such appeals. The words of the rule itself make plain that an appellate court cannot set aside factual findings unless they are clearly erroneous, and this is so even when the chancellor has not seen or heard the witnesses. Sewell v Sewell, 218 Md. 63, 71, 145 A.2d 422, 426 (1958); see, e.g., Dorf v. Skolnik, Md. , , A.2d , (1977) (No. 153, September Term, 1976, opinion filed April 11, 1977); Chalkley v. Chalkley, 236 Md. 329, 333, 203 A.2d 877, 880 (1964). On the other hand, it is equally obvious that the "clearly erroneous" portion of Rule 886 does not

apply to a trial court's determinations of legal questions or conclusions of law based upon findings of fact. See. e.g., Clemson v. Butler Aviation, 266 Md. 666, 671, 296 A.2d 419, 422 (1972); A. S. Abell v. Skeen, 265 Md. 53, 55, 288 A.2d 596, 597 (1972).

Although these two propositions are clear, there is some confusion in our cases with respect to the standard of review applicable to the chancellor's ultimate conclusion as to which party should be awarded custody. Notwithstanding some language in our opinions that this conclusion cannot be set aside unless clearly erroneous. See, e. g., Spencer v. Spencer, 258 Md. 281, 284, 265 A.2d 755, 756 (1970) (per curiam); Goldschmiedt v. Goldschmiedt, 258 Md. 22, 26, 265 A.2d 264, 266 (1970),

we believe that, because such a conclusion technically is not a matter of fact, the clearly erroneous standard has no applicability. However, we also repudiate the suggestion contained in some of our predecessors' opinions, see, e.g., Melton v. Connolly, 219 Md. 184, 188, 148 A.2d 387, 389 (1959); Butler v. Berry, 210 Md. 332, 339-40, 123 A.2d 453, 456 (1956); Burns v Bines, 189 Md. 157, 164, 55 A.2d 487, 490 (1947); cf. Ex Parte Frantum, 214 Md. 100, 105, 133 A.2d 408, 411, cert. denied, 355 U. S. 882 (1957) (adoption case), and relied upon by the Court of Special Appeals in Sullivan v. Auslaender, 12 Md. App.1, 3-5, 276 A.2d 698, 700-01 (1971), and its progeny, see, e.g., Sartoph v. Sartoph, 31 Md.App. 58, 64 & n.1, 354 A.2d 467, 471 (1976); Vernon v. Vernon,

30, Md.App, 564, 566, 354 A.2d 222, 224 (1976), that appellate courts must exercise their "own sound judgment" in determining whether the conclusion of the chancellor was the best one. Quite to the contrary, it is within the sound discretion of the chancellor to award custody according to the exigencies of each case, Miller v. Miller, 191 Md. 396, 407, 62 A.2d 293, 298 (1948), and as our decisions indicate, a reviewing court may interfere with such a determination only on a clear showing of abuse of that discretion. See, e.g., Pontorno v. Pontorno, 257 Md 576, 581, 263 A.2d 820, 822 (1970); Neuwiller v Neuwiller, 257 Md. 285, 287, 262 A.2d 736, 737 (1970); Kauten v. Kauten, supra. 257 Md. at 13, 261 A.2d at 761; Wood v. Wood, 227 Md. 112, 115, 175 A.2d 573, 575 (1961);

Oliver v. Oliver, 217 Md. 222, 230, 140 A.2d 908. 912 (1958); ef. Dorsett v. Dorsett, 281 A.2d 290, 292 (D.C. 1971) (great deference accorded trial judge in child custody cases; no abuse of discretion found); Dinkel v. Dinkel, 322 So.2d 22, 24 (Fla. 1975) (custody determination not reversible except on showing of abuse of discretion); Kauffman v. Kauffman, 30 Ill.App.3d 159, 333 N.E.2d 695, 697 (1975) (custody finding not reversible unless against manifest weight of evidence or "clearly contrary" to best interests of child); Feldman v. Feldman, 55 Mich.App. 147, 222 N.W.2d 2, 3 (1974) (child custody determination not disturbed unless factual findings against great weight of evidence or unless there is abuse of discretion or clear legal error); Pendergraft v.

Pendergraft, 23 N.C.App. 307, 208 S.E. 2d 887, 889 (1974) (custody award not reversed except on showing of abuse of discretion). See generally 2W. Nelson, Divorce and Annulment 15.50 (2d ed. 1961 rev.). Such broad discretion is vested in the chancellor because only he sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; he is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor.

In sum we point out three distinct aspects of review in child custody disputes. When the appellate court scrutinizes factual findings, the

clearly erroneous standard of Rules 886 and 1086 applies.[4] If it appears that the chancellor erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless, Finally, when the appellate court views the ultimate conclusion of the chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the chancellor's decision should be disturbed only if there has been a clear abuse of discretion.

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4. We note that when it appears on review that the chancellor failed to take sufficient evidence into account, we may remand the case without affirmance or reversal for a redetermination, after further proceedings, as to what is in the best interests of the children. See e.g., Quellette v. Wuellette, 246 Md. 604, 608-09, 229 A.2d 129, 131 (1967); Jester v. Jester, 246 Md. 162, 171, 228 A.2d 829, 834 (1967); Md. Rule 871 a.

(2) Finding of Parent's Adultery As Affecting Award of Custody

The Court of Special Appeals in this case, after taking notice of the chancellor's findings of Mrs. Davis' adulterous conduct, concluded that because a presumption of unfitness had arisen, "(a) showing that she had repented and there was little likelihood of a recurrence of these actions was mandatory." 33 Md.App. at 302-03, 364 A.2d at 134. Premised on the ground that this requirement violated her rights to be free from compulsery self-incrimination, U.S.Const., Amend. V; Md. Decl. of Rts., Art. 22, Mrs. Davis argues that the Court of Special Appeals erred in applying it. Although we agree with the petitioner that the Court of Special Appeals applied the wrong standard, we reach that conclusion by a

different route, and find it unnecessary to pass on constitutional issues.

The Maryland Reports are filled with decisions which discuss the effect a parent's adulterous conduct has on the award of custody. Although our prior decisions recognized that one who has engaged in adultery is not ipso facto unfit to have custody, see, e.g., Orndoff v. Orndoff, 252 Md. 519, 522, 250 A.2d 627, 628 (1969); Cornwell v. Cornwell, 244 Md. 674, 679, 224 A.2d 870, 873 (1966), our predecessors held that a "strong presumption" of unfitness arises which only a "strong showing" of facts evidencing fitness will overcome. See, e.g., Shanbarker v. Dalton, 251 Md. 252, 257, 247 A.2d 278, 281 (1968); Bray v. Bray, 225 Md. 476, 482-83, 171 A.2d 500, 504

(1961). Such decisions point out that this rule was not formulated to punish the guilty parent, but rather was based on the presumption that adultery is a "highly persuasive indicium" that the offending person is not the better of the two to raise the child. See, e.g., Palmer v. Palmer, 238 Md. 327, 331, 207 A.2d 481, 483 (1965); Wallis v. Wallis, 235 Md. 33, 36-37, 200 A.2d 164, 165-66 (1964).

Perhaps in response to the rapid social and moral changes in our society, two of this Court's most recent cases have implicitly recognized that a finding of adultery per se no longer is a "highly persuasive indicium" of unfitness to have custody of one's child. In Pontorno v Pontorno, supra, 257 Md. at 580, 263 A.2d at 822, Judge Finan for

the Court, without mention of any presumption of unfitness, stated that "a finding of adultery is relevant to the extent that it may affect the welfare of the children." And in Neuwiller v. Neuwiller, supra, 257 Md. at 286, 262 A.2d at 737, this Court, again speaking through Judge Finan, held that where adulterous behavior is "not determinative of the central issue (as to) who will further the best interests of the child," an infant may be awarded to a mother despite the fact that there is no showing that she had discontinued her conduct. Cf, Hild v. Hild, 221 Md. 349, 363-64, 157 A.2d 442, 450 (1960) (Hammond, J., dissenting) (adultery should not create presumption of unfitness, but should be weighed by trier of fact in relation to individuals in each

case). We now explicitly hold what the Pontorno and Neuwiller cases implicitly recognized, i.e., that whereas the fact of adultery may be a relevant consideration in child custody awards, no presumption of unfitness on the part of the adulterous parent arises from it; rather it should be weighed, along with all other pertinent factors, only insofar as it affects the child's welfare. We note that this view is in accord with the decisions of the majority of other courts around the country. See, e.g., Dinkel v. Dinkel, supra, 332 So.2d at 24; Lockard v. Lockard, 193 Neb. 400, 227 N.W.2d 581, 583 (1975); Commonwealth of Pa. ex rel Myers v. Myers, Pa. , 360 A.2d 587, 590 (1976). See generally Annot., 23 A.L.R.3d 6, 38-42 (1969).

(3) The Present Case

We now return to a consideration of the custody award by Judge Latham in this case. The chancellor had the benefit of several sources of information, gathered over a prolonged period of time, to aid his determination of what custodial arrangement would be in the best interests of Leigh. On January 10, 1975, a hearing was held before a domestic relations master in connection with the pendente lite custody of the three minor children. Six witnesses testified at that hearing: Mr. Davis and a private investigator hired by him, as well as Mrs. Davis, two of Leigh's teachers and one of the petitioner's neighbors. Rejecting Mr. Davis' contention that his wife was unfit to be custodian of Leigh, the mas-

ter made the following findings and recommendation in the report.

> This Master has carefully considered the testimony adduced. While it may be that Mrs. Davis has, on occasion, shown what might be characterized as poor judgment in her association with other men, she has, in the opinion of this Master, (at least on the record of the hearing) sequestered the minor daughter from her association with her two (2) male friends. The Master does not feel that such association as has been shown clearly by the testimony to exist, is such as would warrant, at least on a pendente lite basis, the removal of the child from the custody of the mother, Katherine Leigh is adequately housed and clothed and attends a school not too far from her home. She appears to be doing well in school and has a competent sitter located in the same building in which the child lives, with a playmate her own age with whom to associate, who is the child of the same sitter.

At the May 21 and 22, 1975 divorce and custody proceedings before Judge Latham, Mr. Davis, together with three private investigators, sought to establish the

adulterous conduct of his wife and her unfitness to be awarded permanent custody of Leigh. Mrs. Davis, along with several neighbors and babysitters of Leigh as well as her two teachers, sought to convince the court that the mother's continued custody would be in Leigh's best interests.

Before Judge Latham ultimately made his decision as to the custody of the children (the divorce having been decreed in July), he had the benefit of a further hearing as well as the report of the court investigator. At a December 11, 1975 hearing, Mr. Davis again testified on his own behalf, and called two witnesses who were neighbors and potential babysitters for Leigh; he also interrogated his former wife. The court-ordered report contained additional in-

formation hearing on the fitness of both parties to have permanent custody of Leigh.[5] The investigator, after having interviewed both parents and all three children, found no evidence of sexual misconduct by Mrs. Davis beyond February 1975, and recommended that the present

5. Although the investigator's report was never received into evidence, it is clear from the record that both parties studied it and that the court thought it unnecessary to formally admit it into evidence at the December 11, 1975 hearing. Judge Latham remarked at that time:

> It can be introduced and made a part of the evidence, if anybody wants to do it that way. On the other hand, it's not necessary. I have fully read the report on several occasions, as I previously indicated, and whether I agree with everything it says or not remains to be seen.

No one contends that the report is not part of the record on appeal, and we treat it as though it had been formally admitted into evidence at trial. State Hwy. Adm. v. Transamerica Inc., 278 Md. 690, 701, 367, A.2d 509, 516 (1976).

arrangement (John and Mary with Mr. Davis and Leigh with Mrs. Davis) be continued since "(a)ny adjustment by the children that was necessary has been made, and now they seem to have come to terms with the family situation."

Because we must determine whether the chancellor's findings of fact were clearly erroneous, whether he made any errors of law, or whether he abused his discretion in awarding custody of Leigh to her mother, we here quote his oral opinion in full;

> Gentlemen, I have, of course, heard all of the testimony in connection with the original trial of this case, which consumed a couple of days, and I have had the benefit of reviewing that transcript, and I have had the benefit of our custodial investigation in connection with the three children.
>
> It's obvious to me that Mr. Davis can and has provided an ade-

quate or even more than adequate home for the two older children, and certainly on the basis of their latest report cards, and the custodial investigation report they are doing well with him.

It's equally obvious to me that Mrs. Davis is able to and has been providing an adequate home for the youngest daughter, Leigh. It's quite obvious to me that she would be unable to remain where she is if the Court awarded her custody of all three of the children, but I don't intend to do that, so it's not necessary to really even discuss that aspect of the case.

The primary concern of the Court in this particular case has been the younger child, Leigh, who has been with her mother, and as to whether that should be at least a temporary, permanent arrangement, or whether the custody should be changed to the father.

Being aware of the law in reference to the adultery of the mother and the presumptions that arise from it, at the same time we must consider that the law in the State of Maryland is, and has been for some time, that the best interests of the child is the paramount consideration that the Court should consider.

The present situation, obviously whenever a father and mother are divorced, and children are separated, is not very desirable. At the same time, for a substantial period of time, well in excess of a year, the present arrangement has been in effect, and has apparanently been working. That is not to say that if Mr. Davis had had Leigh during that period of time that she might not have made the same progress in school, and in her upbringing as she has with her mother. At the same time, the Court, based on all the information in this case, is reluctant at this point to make any change in the custody of Leigh, because I think that that would not be in her best interests.

Now, I am mindful though of the fact that, and as you had indicated, Mr. Foley (respondent's attorney) , this is something that the Court has the right to review, and I would certainly expect to review it very carefully if at any time any information was brought to the Court's attention that she was, Mrs. Davis was conducting herself in any way that made it inadvisable to keep the custody of Leigh with her.

Initially, we note that none of the chancellor's findings of fact is clearly

erroneous--in reality, there appear to be no factual matters that ever were seriously in dispute. We also conclude that the chancellor recognized that the law requires custody to be awarded so as to further the best interests and welfare of the child. It is obvious that in effectuating this legal mandate, Judge Latham took into account the crucial factors present here, among them: that Leigh had been living with her mother alone for the past two years and was adjusted to this arrangement; that she was doing well in school and was adequately provided for at home; that even though Mrs. Davis had engaged in adulterous conduct in the past, there was not showing that it had ever deleteriously affected Leigh; and that there was uncontroverted evidence that Mrs.

Davis had engaged in no sexual misconduct since February 1975. We discern no abuse of discretion. A case such as this, where custody might well have been awarded to either parent, aptly demonstrates the advisability of leaving to the chancellor the delicate weighing process necessary in child custody cases; to disturb the award here would require that we substitute our judgment for that of the chancellor, and an appellate court sits in a much less advantageous position to assure that the child's welfare is best promoted.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. CASE REMANDED TO THAT COURT WITH DIRECTIONS THAT IT AFFIRM THE ORDER OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY. COSTS TO BE PAID BY RESPONDENT